FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5414

ILYA WOLSTON,
Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., D/B/A READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 117-130) is reported at 578 F.2d 427. The opinion of the district court (App. 93-116) is reported at 429 F. Supp. 167.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. This Court extended the time for filing a petition for a writ of certiorari to and including September 21, 1978. The petition was filed on September 18, 1978, and was granted on January 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

QUESTIONS PRESENTED

1. Whether petitioner was correctly held to be a public figure under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), for the limited range of issues involved in this case.

2. Whether summary judgment was properly granted in respondents' favor on the issue of whether the allegedly libelous statement was published with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not," as required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-72 (1964), and its progeny.

STATEMENT

A. Introduction

This is a libel action seeking damages against the author, John Barron, and the respondent publishers of a book entitled *KGB: The Secret Work of Soviet Secret Agents*

(hereinafter *KGB*). Respondent The Reader's Digest Association, Inc. (Reader's Digest) is the initial publisher of *KGB*, and respondents Bantam Books, Inc., The Book-of-the-Month Club, Inc., and Macmillan Book Clubs, Inc. are subsequent publishers under contractual arrangements with Reader's Digest. The complaint filed by the petitioner, Ilya Wolston, alleged that *KGB* contained false and defamatory statements to the effect that he had been identified as a Soviet agent and that he had been indicted for espionage.

The district court granted respondents' motion for summary judgment. It held that petitioner was a public figure with regard to the limited range of issues relating to Soviet espionage in the 1940's and 1950's, so that, to recover for defamatory falsehood, he would have to prove that respondents published the challenged statements with "actual malice." The court further held that there was no genuine issue in that regard and that petitioner could not make the showing required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). (App. 114). The court of appeals affirmed. (App. 117).

B. Background Regarding Petitioner's Status As A Public Figure For The Limited Range of Issues Regarding Soviet Espionage

Petitioner, Ilya Wolston, was born in Russia in 1918. After living in Lithuania, Germany, France, and England, he emigrated to the United States in 1939 and became a naturalized citizen in 1943. (CA App. 157-160).[1] In 1942, Wolston was drafted into the United States Army and attended the U.S. Army Intelligence School at Camp Ritchie, Maryland, where he was trained as a military

[1] The Appendix filed with the Court will be cited as "App." References to the record as contained in the appendix filed in the court of appeals will be cited as "CA App."

intelligence interpreter. (CA App. 168-169). Thereafter he served mainly in Alaska as liaison to Soviet military personnel. In 1945, he was assigned to San Francisco as an interpreter and liaison to the Soviet airplane crews bringing the Soviet delegation to the United Nations Conference on International Organization. (CA App. 171-172). Following his discharge in 1946, he obtained a position as an interpreter in Germany for the United States Military Government and later for the Department of State in Allied-occupied Berlin. (CA App. 175-177). Wolston eventually became a liaison officer to the Political Advisor of the U.S. High Commissioner of Germany and was responsible for the travel of American diplomats stationed in U.S. embassies in Moscow and Warsaw, a position requiring him to deal with the Soviet consulate. (CA App. 176-180).

In 1951, the Department of State terminated Wolston's employment. On his return to the United States, Wolston worked as a clerk, then enrolled in an undergraduate program, and in 1955 moved to Washington, D.C. to work for several months as a translator for the Army Map Service and finally as a free-lance translator until 1957. (CA App. 180-182, 188-195).

During 1957 and 1958, a special federal grand jury convened in the Southern District of New York was conducting a major investigation into the activities of Soviet intelligence agents in the United States. The grand jury's inquiry was the outgrowth of an intensive, ten-year investigation by the Federal Bureau of Investigation into Soviet espionage. That investigation culminated on January 25, 1957, in the disclosure of an espionage ring in New York City and in the FBI's arrest on that day of Wolston's aunt and uncle, Myra and Jack Soble, on charges of conspiring to commit espionage. On February 4, 1957, the special federal grand jury indicted the Sobles on five counts charging espionage, conspiracy,

and violation of the Registration Acts. On April 10, 1957, the Sobles pleaded guilty to espionage charges and thereafter cooperated with the government by testifying before the grand jury. Jack Soble was later sentenced to seven-years' imprisonment and Myra Soble was sentenced to four years. (App. 78-80, 86). In the ensuing months the FBI investigation focused on other participants in the Soviet espionage ring, resulting in further espionage indictments, convictions, and guilty pleas. (App. 78-90).

On the day of the Sobles' arrest, the FBI interviewed Wolston at his home. Shortly thereafter, the grand jury, pursuing its inquiry into the activities of those in close contact with Jack Soble, subpoenaed Wolston, who appeared before it in early 1957. (App. 85-86, CA App. 209-214). After the Sobles entered guilty pleas and offered cooperation in the investigation, the grand jury's efforts to obtain further testimony from Wolston proved unsuccessful. (App. 85-90, CA App. 75). For over fourteen months, notwithstanding a number of subpoenas, Wolston failed to appear. (App. 85-90). Finally, on June 23, 1958, a subpoena was issued for Wolston's appearance on July 1, 1958. The day before Wolston's scheduled appearance, the Assistant United States Attorney conducting the investigation informed Wolston's counsel that if Wolston had any reasons for not testifying, he should make them known to the grand jury or the court. He warned that, should Wolston fail to appear, the government would take appropriate measures to punish his refusal to comply with the subpoena. (App. 89).

Wolston nevertheless failed to respond to the subpoena. The United States District Court for the Southern District of New York thereupon issued a show cause order, and on August 7, 1958, following a hearing on the matter, Wolston pleaded guilty to the charge of criminal contempt. (App. 36-37, 82-83). On August 13, 1958, Wolston

received a one-year suspended sentence and was placed on probation for three years on the condition that he be available for any further grand jury inquiries regarding Soviet espionage. (App. 83).

The affidavit of Assistant U.S. Attorney Herbert C. Kantor, submitted in the contempt proceeding, recounted Wolston's prior failures to respond to grand jury subpoenas for more than a year and concluded that "Wolston's actions demonstrate deliberate disregard for the process of this Court." (App. 86-89). He noted that Wolston's conduct resulted in "Wolston's avoiding testifying before this Grand Jury" because its statutory period had expired, and called attention to the "numerous occasions in which Wolston caused the Grand Jury to convene and stand idle." (App. 89-90). He pointed out that Wolston's sudden offer to appear before the grand jury, first made on the day of the contempt proceeding, July 28, was "meaningless" because of the expiration of the grand jury's term on that day. (App. 90).

Wolston's criminal evasion of the grand jury subpoena and the contempt proceedings against him attracted public attention and were immediately the subject of at least fifteen newspaper articles, both in Washington, D.C., where he lived, and in New York, where the grand jury was sitting. (App. 41-52). The articles focused on Wolston's efforts to resist the grand jury subpoena and on the United States District Court's show cause order. Reflecting the public's continuing interest in the grand jury's investigation of Soviet espionage activities, and in Wolston's relationship to the confessed spy Jack Soble, the stories bore captions such as "Spy Inquiry Hunts Nephew of Soble," "Hunt Soble Kin for Spy Data," "Soble Nephew Facing Jail in Spy Quiz Snub," "Soble Nephew Faces Rap for Probe Dodge," "Court Calls Spy's Nephew," and "Kin of Soble Faces Quiz on Contempt." (App. 41-48).

The articles noted that Jack Soble had pleaded guilty to "heading a spy ring that sent vital government secrets to the Soviet Union," that his wife "also was jailed for spying," and that Wolston was their nephew. (App. 45). The stories reported statements by Assistant United States Attorney Kantor that Wolston had been in contact with the Sobles in Europe and the United States for a long time before the FBI arrested them in January 1957. (App. 41-42). Three of the articles reported a statement by Kantor that Wolston was believed to have material information about a "general criminal conspiracy against the United States." (App. 41-42, 44-49).

The newspapers also reported that the federal judge presiding at the contempt hearing commented that "there is no question in my mind that there was a studied attempt [by Wolston] to avoid [an] appearance before this grand jury." (App. 48, 52). Other news articles stated that, according to Kantor, Wolston had ignored five prior subpoenas issued by the special federal grand jury and had "showered [Kantor's] office with letters from physicians, telephone excuses and visits from his wife." (App. 43).

News articles were later published about Wolston's guilty plea, sentence, and probation. (App. 50-52). The articles described him as a "former Army intelligence specialist and liaison man with the Soviet occupation forces in Germany" (App. 50) and again noted that "Wolston had been in frequent contact with [Jack] Soble both in the U.S. and in Europe before Soble's arrest as head of a spy ring." (App. 52). In sum, Wolston's activities and criminal conduct in relation to the special federal grand jury's investigation attracted extended public comment and attention.

In subsequent years these matters continued to be the subject of public discussion. In 1959, a book written by

Boris Morros entitled *My Ten Years As a Counterspy* was published by Viking Press, Inc. (App. 30). Morros, a confessed Soviet espionage agent who later worked for the FBI, had been a former confederate of Jack Soble. In his book, Morros identified Wolston as a Soviet espionage agent in the United States. According to Morros, Soble claimed than an individual who had operated in Germany under the code name "Slava" had supplied him with information valuable to the Soviets. "Slava" was said to have rendered services to the Soviets in Alaska, among other places, and in connection with the formation of the United Nations in 1945, at least once accepting money from the Soviet spy ring's agent in San Francisco. (App. 31). Morros stated that, in the fall of 1954, Soble identified Ilya Wolston as "Slava." Morros added, however, that he knew nothing about Wolston's activities except what Soble, "a confirmed liar," had told him. (App. 34). The book also recited that Wolston had failed to respond to six grand jury subpoenas and that he had pleaded guilty and had received a one-year suspended sentence. (App. 34). Approximately 12,500 hard-cover copies and 141,000 paperback copies of the Morros book were printed. (CA App. 348).

In 1960, the FBI completed a report entitled "Exposé of Soviet Espionage, May 1960." (App. 55). By direction of the Attorney General, the FBI report was transmitted to the Internal Security Subcommittee of the Senate Judiciary Committee for use by its Subcommittee to Investigate the Administration of the Internal Security Act. In July of 1960, the Subcommittee ordered the FBI report to be printed as a "Senate document" and described the report as "a summary of known Soviet espionage cases in the United States over the past fifteen years." (App. 56). It further directed that thirteen thousand copies be printed. In the Appendices, the FBI report set forth cases presented to federal courts "which unquestionably reveal Soviet efforts to steal American secrets affecting the

national security of this country." (App. 78). On page 24, in a section entitled the "Jack Soble Case", the report stated that an FBI investigation resulted in identifying Ilya Wolston as a Soviet intelligence agent:

"F. *Jack Soble Case*

> In the early 1940's the FBI was conducting an intensive investigation into the activities of Vassili Zubilin (true name , Vassili Mikhailovich Zarubin), Third Secretary of the Soviet Embassy, Washington, D.C. Zubilin had entered the United States on December 25, 1941, with his wife, Elizabeth, and son, Peter. The investigation disclosed that Zubilin had been an important Soviet intelligence agent for many years. During 1934-1937, he was in the United States on several occasions utilizing an American passport fraudulently obtained under the name of Edward Joseph Herbert.
>
> The first break in the FBI investigation came when in the Spring of 1943, Zubilin, while under physical surveillance by the FBI, was observed to contact Boris Michael Morros, a motion-picture producer in Hollywood. After extensive investigation into the activities of Morros, he was interviewed by the FBI in July, 1947 and admitted he was recruited by Zubilin for Soviet intelligence activities. Morros, thereafter, agreed to operate as a double agent against the Soviets under the direction of the FBI. Thus began an operation of intrigue which led to the expose [sic] of a Soviet espionage ring in New York City culminated by the arrest on January 25, 1957, by FBI Agents of Jack Soble, Myra Soble and Jacob Albam on charges of conspiring to commit espionage. *In addition, the*

FBI investigation resulted in identifying as Soviet intelligence agents, Jane and George Zlatovski, who were indicted on July 8, 1957, charged with espionage conspiracy; Alfred and Martha Stern, who were indicted on September 9, 1957, on two counts charging espionage conspiracy; *Ilya Wolston, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern District of New York;* Mark Zborowski, who was indicted for perjury on April 18, 1958, as a result of his denial before the Federal Grand Jury that he knew Jack Soble; and Vassili Molev, an official attached to the Soviet Embassy, Washington, D.C., who was declared persona non grata, January 25, 1957." (App. 78-79) (Emphasis added).

The FBI report stated that the Sobles pleaded guilty to espionage charges and emphasized the important position that Jack Soble held in the Soviet Union's espionage network:

> "Soble supervised activities of Soviet agents both in the United States and Europe; assigned them to recruit U.S. Government employees stationed abroad, to obtain information concerning military equipment and supplies; and has claimed to have obtained information concerning the number of atomic bombs stockpiled in the United States and the rate of atomic bomb production as well as photographs of atomic 'bunkers' in which bombs were stored." (App. 79-80).

In another section entitled "Ilya Wolston," included as part of the "Jack Soble Case," the FBI report reiterated the information that Soble had provided to Morros regarding the Soviet agent known as "Slava" and stated that in January 1955 Soble identified Wolston as "Slava." It further revealed that Soble, when pleading guilty to espionage in April 1957, furnished the FBI with information identifying Wolston as a Soviet agent:

> "5. *Ilya Wolston*
>
> Wolston was born in Russia. He entered the United States on April 30, 1939. He was naturalized a United States citizen on May 18, 1943. In 1942-1946 he served in the U.S. Army, in 1943 attending the U.S. Army Intelligence School at Camp Ritchie.
>
> On several occasions beginning May 7, 1950, Jack Soble furnished Boris Morros with information concerning an individual he described as a U.S. Army Colonel in Germany who furnished him information under the code name 'Slava,' which was very valuable to the Soviets. It is noted that from October 1949, until July, 1951, Wolston was employed by the U.S. High Commissioner of Germany in Berlin. In January, 1955, Soble identified his nephew, Ilya Wolston as 'Slava.' In addition, Jack Soble, pleading guilty in April, 1957, furnished information identifying Wolston as a Soviet agent who provided him information for the Soviets on several occasions beginning when Wolston was in a military camp, about 1943. Soble said Wolston gave him information concerning his assignments and names of four persons at the camp whom he believed could be approached by the Soviets." (App. 82-83).

In addition, the FBI report stated that in 1951 information concerning Wolston's probable identification as a Soviet agent had been provided to the Department of State:

> "Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin." (App. 83).

As set forth above, the FBI report indicated that the FBI did not rely exclusively or even primarily on Soble in identifying Wolston as a Soviet agent. On page 24, the report categorically stated, without any reference to Soble, that an FBI investigation had resulted in the identification of Wolston as a Soviet agent (App. 79). Another section of the report stated that information concerning his probable identification as a Soviet agent had been furnished to the Department of State in 1951, three years before Soble first told Morros that Wolston was "Slava" and six years before Soble's eventual arrest.

In all, the FBI report listed ten persons (including Wolston) as involved in the "Jack Soble Case" and identified each as a Soviet agent. The FBI report further indicated that, aside from Wolston, eight of the remaining nine were indicted for espionage or perjury, and either pleaded guilty, were convicted, or became fugitives. The ninth, an attache to the Soviet delegation to the United Nations, was declared *persona non grata* and left the country. The report disclosed that the tenth, Wolston, had received a one-year suspended sentence and three-years probation for failure to appear before a federal grand jury in 1958. (App. 78-90).

C. Publication of *KBG: The Secret Work of Soviet Secret Agents*

In January 1974, Reader's Digest Press published *KGB*, which details the functions and activities of the Soviet Union's intelligence and espionage organization. The author of *KGB* is John Barron, a senior editor of Reader's Digest who has received numerous awards and honors for distinguished reporting. (App. 53). Barron devoted more than four years to researching and writing the book, drawing on the world-wide research facilities of the Reader's Digest organization. Another Reader's Digest professional assisted the author in researching *KGB* on a full-time basis during the four-year period in which the book was prepared.

In Chapter IX of the book, the author summarizes the history of Soviet espionage and the Soviet Union's systematic employment of intelligence agents to obtain scientific, industrial, and military secrets of other nations. On page 188, the book notes that "Even in 1962, when Khruschev offered assurances that the Soviet Union did not intend to spy on anyone, the evidence of worldwide Soviet espionage abounded in public records." (App. 27). Referring to disclosures by "royal commissions in Canada and Australia, and official investigations in Great Britain and the United States," the book then contains the following sentence and footnote concerning Wolston:

> "*Among Soviet agents identified in the United States were* Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.*

* No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution . . . ." (App. 27-28). (Emphasis added).

In addition, the following entry concerning Wolston appears in the index to *KGB:*

> "Wolston, Ilya, Soviet agent in U.S., 188." (CA App. 121).

In the "Chapter Notes," described in the author's preface as explaining the basis on which each chapter is written, the following source is listed for the chapter referring to Wolston:

> "Soviet agents in U.S.: *Exposé of Soviet Espionage (Prepared by the FBI)*, R SSIS 1960." (App. 29).

In the more than 460 pages of *KGB*, the sentences quoted above are the only references to Wolston.

D. Proceedings in District Court and Court of Appeals

In March 1975, Wolston filed this libel action against respondents, asserting that the statements about him in *KGB* damaged his reputation, embarrassed and humiliated him, and demanding damages for this claimed injury.[2]

On deposition and in his affidavit, Barron testified that in referring to Wolston in *KGB* as among those identified as Soviet agents, he relied on the FBI report,

[2] On deposition Wolston testified that his sole complaint against the respondents was based on the statement in *KGB* that he had been identified as a Soviet agent. (CA App. 258-259).

Although Wolston claimed injury from the publication of *KGB*, his complaint does not refer to lost income, and on deposition he acknowledged that he could not attribute any loss of actual income to statements made about him in the book. He also admitted that he had been unemployed for the six years preceding publication of *KGB* with the exception of occasional services for which he received "very negligible" compensation. (CA App. 206, 259-260).

which unequivocally identified Wolston as a Soviet intelligence agent. (App. 17-18, 54). He pointed out that the FBI report is cited in the Chapter Notes of *KGB* as a source document for the information about Soviet agents in the United States appearing in Chapter IX, where the reference to Wolston is contained. (App. 54). Barron further noted that, in writing about Soviet espionage activity in *KGB*, it was necessary to "refer people to matters that are a part of the public record" and that the incorporation of the FBI report's findings constituted "using matters that are part of the public record to illustrate a broader and, I think, more original theme," which pertained to disclosures of the more recent clandestine activities of the KGB. (App. 20-21).

Barron stated that he had read the characterization of Soble in Morros' 1959 book, but that he had relied instead on the Senate document or FBI report which, at page 24, categorically stated that an FBI investigation had resulted in the identification of Wolston as a Soviet agent, without any mention of Soble. (App. 23-24). Additionally, Barron noted that, on page 26, the FBI report stated that "[i]nformation concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951," which was six years before Soble was arrested. (App. 24). Barron believed that the FBI had "[o]bviously . . . processed the information" and that it was "clear the information did not emanate from Jack Soble." (App. 24).

Barron also knew that Soble, after his arrest and "ideological defection", had provided information to the government that "proved to be quite reliable in many cases," and that, as the FBI report stated, in 1957 Soble had supplied additional information identifying Wolston as a Soviet agent. (App. 25). Barron explained that

Morros' view of Soble's reputation for truthfulness did not give him concern because Soble had earned it while acting as a spy:

> "I think we are speaking about, in a sense, two different people here—the Jack Soble as a Soviet agent and still under Soviet discipline, who was a professional agent, dissembling by nature and not necessarily immorally in his scheme of ethics as an agent, and then the Jack Soble who for reasons of his own decided to tell what he knew to the United States Government." (App. 25).

Barron testified that, as a journalist, his very extensive dealings with the FBI over many years, covering numerous subjects, had shown that information imparted to him by the FBI was reliable. (App. 21). Moreover, Barron regarded the FBI report concerning Wolston as consistent with what was known from other sources. (App. 21-22). Any further verification of the FBI report regarding Wolston was deemed unnecessary "[b]ecause this was a considered formal statement by the FBI bearing the imprimatur and passive endorsement of a constituted committee of the Senate, responsible for internal security matters; and our experience has been that statements of the FBI issued under such circumstances are reliable and legally defensible .... If the statement was made formally in writing and disseminated by a committee of the Senate, we considered it reliable." (App. 21-22).

Barron also refuted Wolston's claim that the footnote on page 188 of *KGB*, in referring to Wolston as among those who had been convicted of "contempt charges following espionage indictments," wrongly implied that Wolston had been indicted for espionage. Barron explained that the footnote was not false and that the phrase "following espionage indictments" provided the

accurate historical context in which Wolston pleaded guilty to contempt. It did not state that Wolston was himself indicted for espionage. As Barron testified, "I believe and know that he [Wolston] fell in the category of someone who was convicted of contempt of court following espionage indictments, which raised matters about which he refused to testify."[3] It was further shown, as reflected in the FBI report on Soviet espionage, that Wolston's guilty plea did in fact occur following espionage indictments of others by the special federal grand jury. (App. 78-84).

The affidavits and depositions established that at no time prior to publication of *KGB* was Barron ever aware of any fact giving him reason to doubt the truth of any statement in the book. (App. 54). No evidence was adduced to suggest that the accuracy of the FBI report had been called into question at the time *KGB* was published, or that Barron had, or should have had, any reason to doubt the accuracy of the FBI's identification of Wolston as a Soviet agent. Barron testified under oath that he "was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and ... was aware of no fact that tended to make ... [him] doubt the truth of the book or of any statement in it." (App. 54). No evidence was introduced which impeached or contradicted this sworn statement.

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[3] When questioned on deposition about the footnote, Barron replied:

> "A. I believe and know that he fell in the category of someone who was convicted of contempt of court following espionage indictments, which raised matters about which he refused to testify.
>
> Q. (by Mr. Dickstein): Following his espionage indictment?
>
> A. No. I didn't say his espionage indictment, but if I meant to say his or theirs, I would have said it." (CA App. 70).

Affidavit evidence further established that the respondent publishers believed that *KGB* was accurate in all respects and were not aware of any fact that tended to make them doubt the truth of the book. Bantam, Book-of-the-Month, and Macmillan also relied upon the reputation of Reader's Digest as a well-known and respectable publishing house. This reliance was shown to be in accord with the normal and recognized standards of the publishing industry. (CA App. 341-346).

On this record, the district court granted respondents' motion for summary judgment. 429 F. Supp. 167 (D.D.C. 1977). The court of appeals unanimously affirmed. 578 F.2d 427 (D.C. Cir. 1978). It held that under the standard of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), Wolston was a public figure for the limited purpose of comment on his connection with, or involvement in, Soviet espionage in the 1940's and 1950's, which was the subject of the alleged falsehoods. (App. 107). The court therefore noted that, in order to recover, Wolston was required to demonstrate that the challenged statements were published with "actual malice," that is, with knowledge that they were false or with reckless disregard of whether they were false or not. (App. 114). Because the evidence raised no genuine issue with regard to the existence of actual malice on respondents' part, and because Wolston could not make the necessary showing in that regard in view of the uncontradicted evidence, the court of appeals concluded that summary judgment for respondents was required.

SUMMARY OF ARGUMENT

The First Amendment guarantees of freedom of speech and press, as this Court has recognized, embody our profound national commitment to the ideal of democratic

self-government. Public discussion of public issues is, therefore, the duty and right of each citizen and the essence of the Constitution's protection. To give that process the necessary "breathing space," this Court has held that the First Amendment grants to the publisher or citizen-critic the protection of the "actual malice" standard in cases where public officials or public figures seek to impose liability for defamatory falsehood concerning their conduct. That is the situation in the present case.

1. Petitioner became a public figure by voluntarily injecting himself into a public controversy over Soviet espionage in the 1940's and 1950's. His deliberate refusal to comply with the subpoena of the special federal grand jury investigating Soviet espionage resulted in his plea of guilty to the contempt-of-court charge and attracted significant public attention and comment. Criminal activity of this sort inevitably entails a breach of a person's right to privacy and a relinquishment of part of one's interest in protecting his own good name. It is conduct that invites, if not compels, public attention and comment, and the criminal transgressor thereby creates an enhanced risk of defamatory falsehood concerning his activities. Having assumed that risk and entered the public forum, and having placed his name and conduct on the public record, petitioner made himself a public figure as the necessary consequence of those actions.

Moreover, petitioner's criminal conduct occurred in the context of a major public controversy over the espionage activities of Soviet intelligence agents in the United States. This was a subject of profound national concern. The controversy further involved governmental action to protect the national security, in the form of an official investigation by the grand jury and the FBI, and petitioner's criminal resistance to, and his effect upon, that official inquiry. The comments regarding petitioner related to strictly public matters, not his private life or

affairs, and served to inform the public about matters of legitimate interest.

Petitioner's subjective motivation in becoming involved in the controversy is irrelevant. The important protections of the First Amendment cannot depend on the personal desires of a particular public figure, nor can the Constitution require the publisher to guess what those personal motives may be. Despite the self-serving excuses he now offers, petitioner's plea of guilty to the criminal contempt charge conclusively establishes the voluntariness of his conduct, and he is estopped from attempting to relitigate that issue in a different proceeding two decades later. Under the First Amendment, it suffices that petitioner's voluntary conduct was of the sort that invited attention and comment in the context of a public controversy.

2. Summary judgment was properly granted for respondents, because there was no evidence that the challenged statements were published with knowledge of their falsity or with reckless disregard of whether those statements were false or not. Undisputed evidence demonstrated that, in stating that petitioner had been identified as a Soviet agent, Barron relied upon the official FBI report as published by the Senate Subcommittee. The accuracy of that report had not been called into question, and petitioner presented no evidence raising any inference whatsoever of "actual malice." The lower courts, applying traditional summary judgment rules, correctly found that there was no genuine issue of material fact and granted judgment for respondents.

ARGUMENT

I

THE COURTS BELOW CORRECTLY HELD THAT PETITIONER IS A PUBLIC FIGURE FOR THE LIMITED RANGE OF ISSUES INVOLVED IN THIS CASE

A. Petitioner's Status As A Public Figure

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-280 (1964), this Court held that the First Amendment prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." A contrary rule compelling the critic of official conduct to guarantee the truthfulness of all his assertions would be plainly inadequate, the Court explained, because it would inevitably lead to "self-censorship" and would deter would-be critics from voicing their criticisms. *Ibid.*

The "actual malice" standard was later held to be applicable to "public figures" as well as public officials in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). As Chief Justice Warren stated in his concurring opinion in that case, the "citizenry has a substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'." *Id.*, at 162, 164. With a majority of the Justices acquiescing in the Chief Justice's opinion, the Court concluded that the plaintiff football coach, accused in a magazine of conspiring to "fix" a football game, qualified as a public figure and was therefore required to meet the "actual malice" standard. Later, in *Greenbelt Cooperative Publishing Ass'n.* v. *Bresler*, 398 U.S. 6, 9 (1970), the Court held that a local real estate developer,

involved in negotiations with the local city counsel over construction plans and land purchases, must be deemed a public figure "within even the most restrictive definition" of the term.

These principles were subsequently reaffirmed in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). In explaining the rationale for the application of an "actual malice" standard in such cases, the Court observed that public figures "invite attention and comment" and that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.*, at 345. In contrast, a private individual has "relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Ibid.* The Court noted that an individual may become a public figure in either of two alternative ways:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.*, at 351.

In the present case, the district court and the court of appeals unanimously held that Wolston was a public figure under the second category defined in *Gertz*. Both courts agreed that, by failing to respond to the subpoena requiring his appearance before the special federal grand jury investigating Soviet espionage, and by subjecting himself to a contempt citation and ultimately to a guilty plea to a criminal offense, Wolston "invite[d] attention and comment" and "inject[ed] himself . . . into a particular public controversy," as stated in *Gertz*. 418 U.S. at 345, 351.

Wolston's unlawful conduct qualified him as a "public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 40's and 1950's." (App. 122). We submit that the lower courts were plainly correct in determining that Wolston is public figure for this limited range of issues.

Wolston's acts occurred in the context of an ongoing public controversy over the espionage activities of Soviet intelligence agents in the United States. The FBI had been engaged in an intensive investigation of a Soviet espionage ring in New York City, resulting in the arrest and indictment of Wolston's uncle and aunt, Jack and Myra Soble, who pleaded guilty to espionage charges in April 1957. In the ensuing months, further indictments had been returned against others involved in these espionage matters, producing additional guilty pleas, convictions, and a diplomatic expulsion. (App. 78-84).

It is in this setting, then, that Wolston's effort to resist an appearance before the special federal grand jury must be viewed. It is undisputed that, on July 1, 1958, Wolston failed to obey a duly authorized grand jury subpoena requiring his appearance on that date, and on August 7, 1958, he entered a plea of guilty to a criminal-contempt charge. On August 13, he received a one-year suspended sentence on his guilty plea and was placed on conditional probation.

The events surrounding petitioner's criminal conduct, as the court of appeals pointed out, "immediately attracted a significant amount of public attention and coverage by the newspapers." (App. 121). Wolston's prior failures to appear before the grand jury and his relationship to the confessed Soviet spy Jack Soble were discussed in the press. Attention was also focused on the government attorney's statement that Wolston had been in frequent contact with Soble for some time before his arrest (App. 52) and that Wolston's testimony was sought

because he was believed to have information material to the espionage investigation. The show cause order, the contempt proceedings, and Wolston's guilty plea and sentence aroused considerable public interest and discussion in the news media.

The public comment and debate continued with the publication of Morros' book in 1959, which recounted Wolston's "failure to respond to six subpoenas issued by a Federal Grand Jury in New York" and his guilty plea to contempt. (App. 34). In 1960, the Subcommittee on Internal Security of the Senate Comittee on the Judiciary published the FBI report, which again called attention to the controversy over Soviet espionage and Wolston's contumacious failure to respond to the grand jury subpoena and resulting sentence. (App. 83).

In sum, by intentionally dishonoring a lawful subpoena requiring his testimony concerning espionage matters, Wolston "voluntarily inject[ed] himself . . . into a particular public controversy and thereby [became] a public figure for a limited range of issues." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 351. His actions "invit[ed] attention and comment" and predictably aroused the public's interest. *Id.*, at 345. In these circumstances, Wolston's conduct undoubtedly gave rise to public-figure status. For where an individual engages in criminal activity, he inevitably breaches his own privacy and runs the risk of closer public scrutiny. He necessarily "relinquishe[s] . . . [a] part of his interest in the protection of his own good name, and consequently he has a . . . [less] compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Ibid.* As the district court stated:

> "[A] contempt conviction for failure to appear before a grand jury investigating espionage invites press and public alike to ask the very questions which the alleged libel in this case purports to answer, namely: 'Why did he fail to appear? What was his connection with the investigation?' Refusal to extend the constitutional privilege to answers to those questions which the press believes to be true (or about which it has no serious doubts) would serve to muzzle, rather than to encourage, the debate which the First Amendment is designed to foster." (App. 108).
>
> "[I]n choosing not to appear before the grand jury, Wolston breached his privacy himself and thereby relinquished a measure of his interest in protecting his reputation . . . . In choosing not to comply, Wolston knew, or certainly should have known, that he would attract attention—again, precisely the sort of attention he challenges in this case. He cannot now be heard to complain that someone noticed him, unless he can prove actual malice. For answers to the questions raised by Wolston's conviction, whether right or wrong, fall within the ambit of the constitutional privilege." (App. 108-110).

This conclusion is particularly compelling where, as here, the criminal conduct was committed in connection with an ongoing controversy over a subject of vital public concern. The security of the nation, and the work of Soviet espionage agents threatening that security, undeniably constitute public issues as to which the debate must be "uninhibited, robust and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. at 271. The precept underlying the First Amendment, that "speech concerning public affairs is . . . the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964), applies with special force in this context. Discussion of these important matters can hardly be conducted without reference to the activities of individuals, such as Wolston, who have placed themselves in the public arena and become part of the

controversy. Public-figure status must therefore attach to Wolston "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 342.

B. Conformity with *Time, Inc.* v. *Firestone* and *Gertz* v. *Robert Welch, Inc.*

This Court's decisions in *Time, Inc.* v. *Firestone, supra*, and *Gertz* v. *Robert Welch, Inc.* confirm the correctness of the judgment below. In *Firestone*, the Court held that Mrs. Firestone was not a public figure merely because of her involvement in divorce litigation. The Court reasoned that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." 424 U.S., at 454. Additionally, Mrs. Firestone had not *voluntarily* injected herself into any public issue but "was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." *Ibid.*

First, unlike *Firestone*, there can be no doubt that the present case does indeed involve a "public controversy" of the nature referred to in *Gertz*. Although not every matter disclosed to the public may be equated with a "public controversy," the events involved here touch upon a subject of highest national importance—the activities of Soviet espionage agents in the United States. It further concerns *governmental actions*—the investigation conducted by the FBI and the special federal grand jury into Soviet espionage—and Wolston's resistance to and effect upon that official inquiry, a resistance which ultimately took the form of criminal conduct defying the grand jury's subpoena. Comment on a citizen's public deeds, where they bear on governmental action and arguably affect or harm the interests of the general citizenry, must

certainly go to the core of the First Amendment's protection of free speech. *New York Times Co.* v. *Sullivan*, 376 U.S., at 267-279.

Added to this is the inherently public nature of a criminal contempt proceeding under the Sixth Amendment's requirement of a public trial. And as this Court recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975), "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . . ." *See Nebraska Press Asso.* v. *Stuart*, 427 U.S. 539 (1976). Criminal contempt proceedings cannot be compared to the divorce litigation involved in *Firestone*, a domestic and customarily private matter.

Second, Wolston came into the public eye through a route dramatically different from Mrs. Firestone's. Wolston's actions, unlike those of Mrs. Firestone, did not consist solely of compulsory involvement in judicial proceedings in a wholly lawful and routine manner. Of course, the Court in *Firestone* recognized that "participants in some litigation may be legitimate 'public figures', either generally or for the limited purpose of that litigation." 424 U.S., at 457. This is not a case, however, where an individual is held to be a public figure "simply by virtue of . . . [his] being drawn into a courtroom" and compelled to reveal wholly private activities to which no legitimate public interest would otherwise attach. Rather, this case involves intentional criminal conduct in defiance of the legal process which occurred in the midst of a genuine public controversy. Unlike Mrs. Firestone's situation, the disclosure of Wolston's activities cannot be said to have come about through no fault of his own. He voluntarily chose to violate the requirements of the legal process by refusing to respond to a grand jury subpoena and thereby subjected himself to a contempt charge and a guilty plea. As the district court stated:

> "In no sense did the Government compel him to remain at home on July 1, 1958. He might instead have chosen to comply with the subpoena or like respondent Firestone, to go to court to vindicate whatever right he may have had not to comply with it. When he failed to choose either of these alternatives, he became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage that outweighed his competing interest in remaining anonymous." (App. 110).

Unlike Mrs. Firestone, Wolston was not compelled by the government to embark on a course that inevitably required public disclosure of private activities. Instead, he freely chose to do so, and accordingly, he breached his own privacy and became part of a genuine public controversy.

Under traditional principles of privacy law, moreover, it has long been recognized that a person convicted of a crime—even a person accused of a crime—can no longer expect the anonymity from public scrutiny that private individuals enjoy. Restatement of Torts (Second) §452D, Comment f, p. 389.[4] *Cf. Cox Broadcasting Corp.* v. *Cohn, supra.* Wolston's activities in relation to the subject matter of Soviet espionage "have become part of the public domain" due to his own fault. *Klein* v. *McGraw Hill, Inc.*, 263 F. Supp. 919, 921 (D.D.C. 1966).

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[4] The Restatement provides:

> "Those who commit crime . . . are . . . persons of public interest, concerning whom the public is entitled to be informed. . . . These persons are regarded as properly subject to public interest. . . ."

Accord: Barbieri v. *News-Journal Co.*, 56 Del. 67, 189 A.2d 773 (1963); *Briscoe* v. *Reader's Digest*, No. LTC 71-2458 (C.D. Cal., July 18, 1972), 1 Med. L. Rptr. 1852. *See also* Hill, *Defamation And Privacy Under The First Amendment*, 76 Column. L. Rev. 1205, 1256 (1976).

These same considerations also separate him from the plaintiff in *Gertz* v. *Robert Welch, Inc., supra. Gertz* involved an attorney who had been retained by the family of the victim of a police shooting to represent them in civil litigation against the convicted policeman. The Court held that the attorney was not a public figure because he had achieved no general fame or notoriety in the community, had taken no part in the prior criminal prosecution of the policeman, had never discussed the criminal or civil trial with the press, and had participated in the civil case solely as the legal representative of his private client.

Put simply, the thrust of *Gertz* is that the customary representation of a private client in a lawsuit, absent more, should not constitute a relinquishment by an attorney of any part of his interest in protecting his own good name. The status of such a private attorney differs significantly from a person who engages in conduct contemptuous of the legal process in a context that places him, by his own actions, in the center of public controversy. Criminal conduct necessarily entails a relinquishment of part of one's interest in protecting his own good name.[5]

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[5] Lower courts have construed the principles of *Gertz* and *Firestone* to require a finding of public-figure status in circumstances far less compelling than these. In *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2nd Cir. 1977), *cert. denied* 434 U.S. 1013 (1977), for example, the Second Circuit held that the natural children of Julius and Ethel Rosenberg were public figures because of the controversy and publicity attending their parents' prosecution on espionage conspiracy charges. Even though the plaintiff children had later changed their names, the Court still concluded that "[i]n the course of the extensive public debate revolving about the Rosenberg trial, appellants [then nine and five years old respectively] were cast into the limelight and became 'public figures' under the *Gertz* standards." 560 F.2d at 1066.

In *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978), the plaintiff was held to be a public figure as a result

(footnote continued)

C. Petitioner's Contentions

1. Wolston argues, however, that he cannot be held to be a public figure because his criminal disregard of the grand jury's subpoena "was not for the purpose of influencing the public views with regard to the espionage controversy . . . ." (Pet. Br. 20). He asserts that his actions were "in no way designed to draw attention to himself" or "to influence the public with respect to any issue" (Pet. Br. 18) and that his failure to respond to the subpoena was allegedly due partly to his "medical condition." (Pet. Br. 20).

Wolston's position, no matter how phrased, amounts to no more than a claim that he did not desire to become a public figure. Public-figure status, however, does not turn on the subjective intent or personal motivation of the individual involved. Under *Gertz*, it suffices that the public figure's actions were such as to have "invit[ed] attention and comment" in the context of a "public controversy". *Gertz* also recognized that public-figure status can arise either voluntarily or involuntarily, that is,

(footnote continued)
of his extensive and voluntary contacts with organized crime figures and others who were the subject of widespread publicity. This was so despite the fact that he had never been convicted of any crime. 411 F. Supp 440, 445 (S.D. Ga. 1976).

Other courts have similarly held that public-figure status may arise where an entity is made the subject of a proposed complaint by an administrative agency, *Trans World Accounts* v. *Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977); or where a person is the subject of an indictment for fraud, *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978); or where a person is arrested on murder charges, *Donaldson* v. *Washington Post*, No. 2331-76 (D.C. Sup. Ct., November 22, 1977), 3 Med. L. Rptr. 1436 (1977).

Certainly Wolston, who entered a guilty plea to a criminal contempt charge in the context of a major espionage investigation, is a public figure as that term has generally been understood by lower courts.

if an individual either "voluntarily injects himself or is drawn into a particular controversy." 418 U.S., at 351.

There can be no doubt that Wolston's actions in avoiding the subpoena were bound to invite public attention and comment, and did so in fact, in the context of the public controversy over Soviet espionage. Whether Wolston subjectively desired publicity is beside the point.[6] Moreover, there is no need to consider Wolston's possibly *involuntary* public-figure status because his guilty plea made him a *voluntary* public figure. Despite his wholly self-serving claims that health problems should have excused his failure to comply with the subpoena, the judgment entered on his guilty plea was a determination of his voluntarily contumacious conduct. There is no ground to impeach that determination almost two decades later, or to allow Wolston to attempt, in effect, to withdraw his guilty plea. Indeed, the doctrine of collateral estoppel settles the matter, and Wolston is conclusively barred from now asserting the contrary. *Parklane Hosiery Co.*,

[6] As the Fifth Circuit stated in *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (1978), *Gertz* does not require that public figure intend to achieve public notice or recognition:

> ". . . the status of public figure *vel non* does not depend upon the desires of an individual . . . . Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, as the district court found, that 'Mr. Rosanova voluntarily engaged in a course that was bound to invite attention and comment.' " *Id.* at 861.

Inc. v. *Shore*, 99 S.Ct. 645 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971).[7]

Wolston's subjective motivation is irrelevant for an additional reason. In *Gertz*, this Court made it clear that "the communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345. As the district court noted below, the First Amendment and attendant concept of "breathing space" are "simply incompatible with a test that forces the media to comprehend a person's motives, or to refrain from commenting on his actions." (App. 109-110). The standard must be an objective one, since "the media has no way of ascertaining with certainty—much less of proving—the actual thought processes of a putative public figure but instead must rely on objective indicia of his intentions." (App. 109). Consequently the press are entitled to assume that an individual's ostensibly voluntary actions are in fact voluntary. Here, Wolston's own plea of guilty to the charge of contempt attested to the voluntariness of his actions.

2. Wolston also appears to believe that an individual can become a public figure only if his objective is avowedly "political." This contention is plainly at odds with *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), where the Court held that football coach Butts was a public figure. In *Gertz*, the Court reaffirmed that the *Butts* decision was

[7] Even if the contempt charge were disregarded, Wolston could alternatively be considered to be an involuntary public figure because of his involvement in the grand jury's investigation and his identification as a Soviet agent in the FBI report. *See Trans World Accounts* v. *Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977) and cases cited in note 5, *supra*.

"correct." *See* 418 U.S. at 343. Political motivation, therefore, is not the touchstone for the determination whether an individual is a public figure, nor is it consistent with the purpose of the First Amendment to saddle the press with the burden of proving the personal desires or objectives of a public figure. Again, under *Gertz* and *Butts* it is enough that Wolston voluntarily injected himself into a public controversy in a manner that invited attention and comment. There are many ways in which an individual can mount a public rostrum, and Wolston's prior conduct speaks louder than his present disclaimers. He knew, or reasonably should have known, that his admittedly contemptuous conduct, in the context of an important public controversy over Soviet espionage, would make him part of the public debate over those issues.

3. Nor can the lapse of time between Wolston's contumacious conduct and the publication of *KGB* in 1974 alter Wolston's public-figure status. The public controversy over Soviet espionage in the 1940's and 1950's, and Wolston's involvement in that controversy, continue to be a legitimate topic of public debate today. In this connection, the district court correctly observed, and the court of appeals agreed, that "historical comment on the espionage-related activities of Wolston and others who became involved in the controversy during the 1950's requires just as much protection as did media coverage of the events as they occurred." (App. 110). "The Constitution," the court stated, "does not confine debate on public issues and the roles of people involved in them to discrete and brief periods of time." (App. 110-111).[8]

[8] Other courts have consistently supported this view. In *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Civ. 1977), the court held that the children of Julius and Ethel Rosenberg were public figures for purposes of a book published almost two decades after their parents' execution in 1953.

(footnote continued)

This observation is particularly appropriate since Wolston's name, his involvement with the special federal grand jury investigating espionage, his citation for contempt-of-court, and his guilty plea, all remain part of the public record. The continuing official recordation of those facts demonstrates Wolston's past and present public-figure status. *See Cox Broadcasting Corp.* v. *Cohn*, *supra*. *See also Bernstein* v. *National Broadcasting Co.*, 129 F.Supp. 817, 828 (D.D.C. 1955).

The values protected by the First Amendment require this conclusion. Authors who chronicle the past in order to illuminate the present make an indispensable contribution to the public exchange of ideas and should not be required to sacrifice constitutional guarantees. A contrary rule would deprive historical commentary of the First Amendment protection thought essential in *New York Times Co.* v. *Sullivan*, *supra*. To be sure, the importance of ensuring a full and free flow of information to the public is no less when the author is an historian than when he is a reporter. Here, the operation of the KGB today cannot be understood without an appreciation of its activities in the past. Elucidation of that history, which was the purpose of the chapter of *KGB* now in question, requires the full measure of the First Amendment's protection if the public is to receive the information required for the public debate over this controversy.

(footnote continued)

The Fourth Circuit stated the same principle in *Time, Inc.* v. *Johnson*, 448 F.2d 378, 381 (1971):

> "[M]ere passage of time will not necessarily insulate from the application of *New York Times Co.* v. *Sullivan*, publications relating to the past public conduct of a then 'public figure.' No rule of repose exists to inhibit speech relating to the public career of a public figure as long as newsworthiness and public interest attach to events in such public career."

This is in accord with privacy law principles. Thus, in *Cohen* v. *Marx*, 94 Cal. App.2d 704, 211 P.2d 320, 321 (1950), the court stated with respect to the relinquishment of one's privacy:

(footnote continued)

We submit, therefore, that the district court and court of appeals correctly concluded that Wolston is a public figure for purposes of comment on his involvement in the public controversy over Soviet espionage in the 1940's and 1950's.

II

SUMMARY JUDGMENT WAS PROPERLY GRANTED TO RESPONDENTS IN THIS CASE.

In challenging the holdings below that respondents were entitled to summary judgment, Wolston takes a wholly mistaken view of this Court's prior decisions construing the First Amendment's guarantee of free speech, and stubbornly refuses to recognize the undisputed nature of the facts established in the record.

As a "public figure" under *Gertz* v. *Robert Welch, Inc.*, *supra*, petitioner is required to prove "actual malice" in order to recover for defamatory falsehood. Under *New York Times Co.* v. *Sullivan*, 376 U.S. at 280, "actual malice" means that the allegedly libelous statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not." "Actual malice," or reckless disregard, is not equivalent to negligence. *Garrison* v. *Louisiana*, 379 U.S. 64, 79 (1964). Instead, it focuses

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(footnote continued)

> "[The plaintiff] could not at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye. As to such acts he had waived his right of privacy and he could not at some subsequent period rescind his waiver."

Accord: Briscoe v. *Reader's Digest Association, Inc.*, *supra; Sidis* v. *F-R. Pub. Corp.* 113 F.2d 806 (2nd Cir. 1940), *cert. denied* 311 U.S. 711 (1941); *Estill* v. *Hearst Publishing Co.*, 186 F.2d 1017, 1022 (7th Cir. 1951); *Barbieri* v. *News Journal Co.*, 189 A.2d 773, 775-776 (Del. 1963).

on the publisher's state of mind, that is, the "defendant's attitude . . . toward the truth or falsity of the material published." *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 252 (1974). Thus, "reckless disregard" for the truth has been interpreted as a "mental element." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 276 (1971). It requires a showing of a "high degree of awareness of . . . probable falsity." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

In *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), the Court summarized its numerous prior decisions defining "actual malice" or "reckless disregard" under *New York Times:*

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (Emphasis added).

The burden is strictly on the plaintiff to prove "actual malice." *St. Amant* v. *Thompson*, 390 U.S. at 730. That showing cannot be made by mere preponderance of the evidence, but must be demonstrated with the "convincing clarity which the constitutional standard demands." *New York Times Co.* v. *Sullivan*, 376 U.S., at 285-86. In sum, plaintiff must make his showing of actual malice with "clear and convincing proof." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 342.

Applying the standards articulated in this Court's prior decisions, both the district court and the court of appeals concluded that there was no genuine issue of fact as to the question of "actual malice" and that summary judgment must be entered for respondents. Reviewing

the entire record, the district court found that petitioner would be unable "to demonstrate clearly and convincingly that Barron or any of his co-defendants entertained serious doubts, or for that matter, any doubts about the truth of the statements in *KGB* that connect Wolston with espionage." (App. 114). The court of appeals likewise agreed that "the evidence raised no genuine issue with respect to the existence of actual malice on his part." (App. 130). Both courts were manifestly correct.

1. With regard to the statement in *KGB* that petitioner was "[a]mong [the] Soviet agents identified in the United States" as a result of official investigations, Wolston now claims there was genuine issue as to "actual malice" because Barron knew that Morros had characterized Soble as a "confirmed liar." In Wolston's view, Soble, an admitted spy, was therefore an unreliable source, even though Morros had not stated that he disbelieved Soble's identification of Wolston as "Slava." Wolston also claims that reckless disregard is shown by Barron's failure to make inquiries of federal agencies or to conduct a more extensive investigation.

The determinative question is whether respondents published the challenged statements with knowledge of their falsity or with reckless disregard of whether the statements were false or not. On that point, Barron testified under oath that he "was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it." (App. 54). The record is utterly devoid of evidence that would in any way tend to impeach Barron's sworn statement or show that Barron must have in fact entertained serious doubts as to the truthfulness of the statement about Wolston. Accordingly, there is simply no genuine issue of material fact for a jury to consider.

In referring to Wolston in *KGB* as having been identified as a Soviet agent, it is undisputed that Barron relied on the FBI report, which categorically states that an FBI investigation resulted in the identification of Wolston as a Soviet agent. On page 24, the report sets forth this conclusion *without any reference to Soble as a source:* "In addition, the FBI investigation resulted in identifying as Soviet intelligence agents . . . Ilya Wolston . . . ." (App. 78-79).

On page 26, the FBI report further states that "[i]nformation concerning the probable indentification of Wolston as a Soviet agent was furnished to the Department of State in 1951 ...." (App. 83). The report adds, however, that it was not until January 1955, four years later, that Soble "identified his nephew, Ilya Wolston as 'Slava,' " the Soviet spy, and in his book Morros states that it was not until the fall of 1954 that Soble first disclosed Wolston's identification as "Slava." As the court of appeals concluded, "the plain intendment of the F.B.I. report, taken as a whole, is that the Bureau's investigation identified Wolston as a Soviet agent, without reference to Soble." (App. 128).[9]

Moreover, Morros' characterization of Soble did not give Barron concern because he knew that Soble had

[9] It was certainly reasonable to believe, as the FBI report itself says, that the FBI's own investigation had resulted in the identification of Wolston as a Soviet agent. Under *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), a rational interpretation of a public document is sufficient defense *as a matter of law* to a suit for defamation where the "actual malice" standard of *New York Times* applies. In *Pape*, the Court held that a newspaper's choice of one of several possible interpretations of an ambiguous government document is not enough to create a jury issue of "actual malice." Here, at least one interpretation of the FBI report (indeed, we submit, the only interpretation) is that the FBI identified Wolston as a Soviet agent without reliance merely, or even primarily, on Soble.

earned it while acting as a spy, and that after his arrest and "ideological defection," Soble had "decided to tell what he knew to the United States Government." (App. 25). Barron also knew that the information Soble then provided "proved to be quite reliable in many cases." (App. 25). The FBI report states that, after his guilty plea, Soble "furnished information identifying Wolston as a Soviet agent..." (App. 82). The plain inference of the FBI report is that the FBI then considered Sobel to be a credible witness, as the court of appeals observed. (App. 182). It was clearly reasonable for Barron to defer to the expertise of the FBI regarding Soble's veracity. The Bureau was in the best position to judge Soble's credibility in view of its own interrogations of Soble and its superior investigative resources and access to counter-intelligence information.

That Barron did not conduct a further investigation to determine whether Wolston was a Soviet agent does not create a jury question as to actual malice. This Court has repeatedly held that the failure of a publisher to investigate is insufficient to establish reckless disregard under *New York Times* and its progeny. "[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 332. In *New York Times* itself, the errors in the published advertisement could have been discovered and corrected if the newspaper had checked news stories in its own files. Nevertheless, the Court held that the failure of the newspaper to do so did not amount to reckless disregard, explaining: "The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false ...." 376 U.S., at 287-88.

Subsequent cases have made clear that there is no duty to investigate before publishing and that the failure to do so does not create a jury question. In *Beckley*

Newspapers v. *Hanks*, 389 U.S. 81 (1967), the defendant newspaper stated in an editorial that plaintiff Hanks had made threats to a Mrs. Hurt in a telephone conversation. The newspaper had interviewed neither Hanks nor Hurt, and at trial its president could say only that the paper felt the threats were a "possibility." In a *per curiam* opinion, the Court reversed a verdict for the plaintiff and held: "it cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not." 389 U.S., at 84-85.

The same principle was applied in *St. Amant* v. *Thompson*, *supra*, where the publisher made a public attack on the plaintiff solely on the basis of an affidavit from one Albin. The publisher had no personal knowledge of plaintiff's activities, and had made no effort to verify Albin's statements with individuals in a position to know. The record was silent as to Albin's reputation for veracity. The Court held, however, that the question was not whether a reasonably prudent man "would have investigated before publishing," but whether the defendant "in fact entertained serious doubts as to the truth of his publication." 390 U.S., at 731.

If the failure to investigate did not establish a jury question as to actual malice in any of these cases, it is difficult to perceive how such a question could be present here, where reliance was placed on an official report of the FBI which disclosed the results of its own investigation into the matter. The Federal Bureau of Investigation is, after all, the federal agency responsible for investigating Soviet espionage agents in the United States, and the expertise and resources available to it in accomplishing that task are far greater than those available to Barron. The FBI report had, moreover, been formally transmitted by direction of the Attorney General to the Subcommittee

of the Senate Judiciary Committee which was responsible for internal security issues, and that subcommittee published it as a Senate document summarizing "known Soviet espionage cases in the United States." (App. 56). Since this was "a considered formal statement by the FBI bearing the imprimatur and passive endorsement of a constituted committee of the Senate," Barron believed that he could rely on the FBI report. (App. 21).

The FBI report also "bore upon its face intrinsic proof of its reliability," as the court of appeals observed. (App. 129). The FBI report stated that the Bureau's investigation of the Jack Soble case resulted in the identification of ten individuals as Soviet intelligence agents. The report indicates that seven of those persons were indicted for espionage and later entered guilty pleas, were convicted, or became fugitives. The eighth was indicted for perjury and was convicted. The ninth was declared *persona non grata* and left the country. The tenth was Wolston. (App. 78-84).

Finally, despite the fact that Barron and his staff devoted over four years to researching and writing *KGB*, not a shred of evidence emerged suggesting that Wolston had ever objected to his identification as a Soviet agent in the FBI report or the Morros book.[10] All the evidence

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[10] Wolston admitted that although he had been aware of the Morros book for six of seven years prior to his deposition in 1975, he had taken no action whatsoever, neither filing a libel suit nor writing to the publisher of the Morros book to complain. (App. 39, CA App. 230).

There was also no evidence that a further investigation by Barron could have uncovered facts disproving the FBI's identification of Wolston as a Soviet agent. Any inconsistency between Wolston's military rank and Soble's 1954 description of "Slava" as an Army colonel, as related in the Morros book, was presumably considered by the FBI when it issued its 1960 report. Moreover, Soble's description of Slava in the Morros book bears

(footnote continued)

confirmed Barron's sworn statement was that "[a]t no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or any statement in it." (App. 54). That statement was completely uncontradicted.

Barron, therefore, properly relied upon a conclusion clearly set forth in a formal publication of the chief government agency which had jurisdiction over the subject matter at issue, in circumstances where there was no evidence that the accuracy of the official report had been challenged, and where the government document bore abundant indicia of reliability. There is absolutely nothing to impeach Barron's sworn statement that he believed his publication to be true and that he was unaware of any fact that would give him reason to doubt the accuracy of his publication. It would be anomalous to hold that a factual question of "actual malice" is created for the jury in view of Wolston's failure to present evidence raising any inference in that regard. The record simply could not support a verdict for petitioner that would be consistent with the First Amendment. Plainly, both lower courts were correct in granting summary judgment in respondents' favor.

(footnote continued)
some remarkably interesting similarities to Wolston. Soble said that Slava had rendered services to the Soviets in Alaska, and evidently in San Francisco in connection with the formation of the United Nations, as well as in Germany. Wolston had been in all three places during approximately the same period. *Compare* App. 82, CA App. 168-180 with App. 30-34.

The FBI also presumably knew the true reasons for Wolston's termination by the Department of State, even if Wolston now asserts he was then told that it was only a reduction in force.

2. Wolston also complains that the footnote on page 188 of *KGB* states falsely that he was indicted for espionage.[11] Barron testified under oath, however, that the footnote's phrase "following espionage indictments" merely provides the accurate historical context in which Wolston pleaded guilty to contempt. The footnote does not state that Wolston was himself indicted for espionage. As Barron explained, "I believe and know that he [Wolston] fell in the category of someone who was convicted of contempt of court following espionage indictments, which raised matters about which he refused to testify." (CA App. 70). The FBI report further shows that Wolston did in fact enter his guilty plea following the indictment of others, including Wolston's own aunt and uncle, for espionage. (App. 78-84). Although the courts below suggested that the footnote might have been imprecisely or ambiguously phrased, both agreed that there was nothing in the record to suggest that Barron "in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. at 731. As the court of appeals aptly observed, "Imprecision and ambiguity of expressions are ills that sometimes afflict even careful and well-intentioned writers, including lawyers and judges." (App. 129-130). There was no basis, therefore, for concluding that petitioner would be able to show actual malice "with convincing clarity which the constitutional standard demands." *New York Times Co.* v. *Sullivan*, 376 U.S. at 285-86.

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[11] That footnote, referring to a list of persons (including Wolston) named in the text as "[a]mong Soviet agents identified in the United States," reads as follows:

> "*No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution. . . ."

3. Wolston asserts, however, that the Court of Appeals for the District of Columbia Circuit has developed a "special rule" for determining whether summary judgment should be granted in defamation cases where the standard of liability is governed by *New York Times Co.* v. *Sullivan* and that this "special rule" involves the court deciding issues of credibility of witnesses and drawing its own inferences from the evidence. (Pet. Br. 25). He further purports to find this "special rule" articulated exclusively in a concurring opinion to the District of Columbia Circuit's decision in *Wasserman* v. *Time, Inc.*, 424 F.2d 920, *cert. denied*, 398 U.S. 940 (1970), and asserts that it differs from the traditional summary judgment standard applied by the Ninth Circuit in *Guam Federation of Teachers, Local 1581, AFT* v. *Ysreal*, 424 F.2d 438, *cert. denied*, 419 U.S. 872 (1974).

There is no conflict between the District of Columbia Circuit and the Ninth Circuit regarding the applicable summary judgment standards. Although not revealed in his brief, the opinion in *Wasserman* upon which Wolston relies in his argument, and which the Ninth Circuit discusses in *Ysreal*, is a concurring opinion. Moreover, the views expressed by its author were purely *obiter dicta*. The Ninth Circuit explicitly recognized this fact in *Ysreal*, noting that "[w]hat [the concurring judge] said was not necessary to the decision, because in *Wasserman* the court reversed a summary judgment for the defendant and remanded 'for trial on the issues of actual malice, defamation and possible damages.'" 492 F.2d at 440.

Furthermore, the court of appeals in the instant case neither cited nor relied upon the views expressed by the concurring opinion in *Wasserman*, even assuming those views could be taken as favoring some special standard. The author of the concurring opinion in *Wasserman* was not a member of the court of appeals' panel in this case.

Nor is there the slightest indication that the District of Columbia Circuit follows any "special rule" for summary judgment in defamation cases, much less the "special rule" plaintiff strives to find in a concurring opinion in one case decided nine years ago. It is instructive that in *Ysreal* the Ninth Circuit observed (492 F.2d at 443) that its own views were in fact consistent with the summary judgment standard actually followed by the Distrcit of Columbia Circuit, citing *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967), and that in *Keogh* there was "*no hint that the court of appeals was making its own judgment as to credibility.*" 492 F.2d at 443 (emphasis added). It is readily apparent that Wolston is merely engineering the construction of his own "straw man."

Finally, as their opinions reflect, both the courts below straightforwardly applied the traditional summary judgment principles, and viewing all the evidence in the light most favorable to Wolston, still concluded that there was no genuine factual issue as to the existence of "actual malice." This is simply not a case where there were any conflicting inferences to be drawn on evidence that went to any genuine issue, since the evidence on "actual malice" was uncontradicted.

What Wolston fails to appreciate is that summary judgment is required because of the demanding Constitutional standard to be applied on the question of liability. In the entire record there is not the slightest indication that Barron published the statements in question with a "high degree of awareness of ... probable falsity." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 332. The mere allegation of a plaintiff, devoid of record evidence, can hardly present a jury question as to whether the publisher acted with reckless disregard of the truth. *St. Amant* v. *Thompson*, 390 U.S. at 731. Accordingly, we submit that both courts below were correct in holding that respondents were entitled to summary judgment.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: March 1979